United Nations

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 974

Case No. 1060: ROBBINS

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Ms. Marsha A. Echols;

Whereas, on 18 January 1999, Marjorie Ann Robbins, a former staff member of the United Nations, filed an application containing pleas which read as follows:

"PLEAS

First, the Respondent's rejection of the unanimous recommendation of the Geneva Joint Appeals Board (hereinafter 'JAB') to pay the Applicant the amount of US$ 55,000 as compensation for damages (...) on the grounds that 'the Board relied on too many assumptions' is unsubstantiated and vague. The Respondent has not indicated which of the Board's assumptions he finds to be 'too many', neither has he explained on what assumptions he relied in reaching his decision to award a lower amount of compensation.

Second, the amount of compensation awarded by the Respondent, namely seven months' net base salary at the rate in effect at the time of the Applicant's separation from service, is totally arbitrary in so far as it bears no obvious relationship to the injury suffered.

Third, the assumptions on which [the] JAB relied in making its unanimous recommendation are sound and the calculation of the compensation (albeit somewhat conservative) is based on an actual financial loss incurred by the Applicant.

Fourth, the Applicant therefore respectfully requests the Tribunal to order the Respondent to pay to her the full compensation unanimously recommended by [the] JAB, namely the sum of US$ 55,000 (fifty-five thousand United States dollars)."

Whereas the Respondent filed his answer on 20 June 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 22 May 1977, with a probationary appointment as Associate Translator at the P-2 level in the Department of Conference Services. On 1 February 1979, she was granted a permanent appointment and a promotion to the P-3 level. On 1 April 1982, she was promoted to the P-4 level. On 15 December 1991, she was transferred to the Centre for Human Rights, Geneva, as Administrative Officer. On 2 June 1992, she was reassigned to the position of Editor to the Official Records Editing Section (ORES), Language Services, Conference Service Division (CSD), United Nations Office at Geneva (UNOG).

On 31 March 1993, the Chief, Language Services, UNOG, recommended the Applicant for the forthcoming P-5 level vacancy of Chief, ORES. On 16 July 1993, however, the Associate Administrative Officer, Executive Office for Office of Conference Services (OCS), advised the Senior Recruitment and Placement Officer, Professional Staffing Service, that OCS could not support the Applicant's candidature as she had not passed the editor's examination and had less experience than other candidates. On 12 August 1993, Language Services re-submitted its recommendation of the Applicant.

On 15 November 1993, the new Placement and Promotion System (ST/AI/390) was implemented. This notwithstanding, in December 1993, it was decided that, in accordance with the transitional placement and promotion measures contained in ST/IC/1993/66, the post of Chief, ORES, would not be advertised but that potential candidates would be resubmitted to UNOG for consideration by the relevant departmental panel, a recommendation from the Head of Department and a review by the Appointment and Promotion bodies. On 31 December 1993, the Chief, ORES, retired and the post became vacant. On 1 January 1994, the Applicant assumed the functions of

Chief, ORES, as Officer-in-Charge, and effective 1 April 1994, the Applicant was granted a special post allowance at the P-5 level.

On 17 February 1994, the Director of Personnel, OHRM, sent a memorandum to the Director of Administration, UNOG, confirming that the post of Chief, ORES, was to be considered under the transitional measures contained in ST/IC/1993/66. On 16 March 1994, the Director of Personnel informed all Heads of Departments and Offices that OHRM and the Appointment and Promotion bodies would not be able to consider any transitional cases received after 31 March 1994.

On 18 July 1994, OHRM made a further request for an evaluation of the seventeen eligible candidates for the post of Chief, ORES, and on 27 October 1994, the UNOG personnel service replied, reiterating its recommendation of the Applicant. On 31 October 1994, the Director, Translation and Editorial Division, OCS, UNOG indicated that he had no objection to the recommendation made by the Chief, Languages Service, UNOG, in favour of the Applicant's candidacy.

On 22 December 1994, the Director, CSD, confirmed to the Chairperson, Appointment and Promotion Board (APB), that the post was to be treated as a transitional case. On 27 April 1995, the Secretary, APB, advised the Director-General, UNOG, that the Applicant's promotion had not been recommended by the APB nor approved by the Secretary-General and that, since the post became vacant after ST/AI/390 (which required notification and circulation of vacancies to the staff at large) came into effect, the APB could not consider the case under the transitional arrangements in ST/IC/1993/66. The Board recommended that the position be advertised and, on 26 May 1995, the vacancy announcement was issued and circulated. On 7 June 1995 the Applicant submitted a formal application and was recommended by OCS.

On 11 October 1995, a memorandum dated 8 August 1995 from the Secretary, APB, was forwarded to the Applicant advising her that, on 27 April 1995, the Secretary-General had approved the APB recommendation to re-circulate the position of Chief, ORES. The Secretary, APB, also expressed her regret that the Applicant had not been informed of the decision at the time and explained that,

> "[u]nder the guidelines set out in ST/IC/1993/66, 'the secretariat of the Appointment and Promotion bodies will inform the selected staff member and the applicants who have submitted additional 'pre-review' information of the outcome of the process' ... [but that] ... [n]o guidelines exist[ed], however, for informing candidates who were recommended by their departments but were not selected by the Secretary-General".

On 6 November 1995, the Applicant wrote to the Secretary-General requesting review of his decision to re-circulate the position, receipt of which was acknowledged by the Chief, Administrative Law Unit, on 30 November 1995.

On 22 December 1995, the Director, CSD, recommended the Applicant for the post. Nonetheless, on 3 January 1996, the Applicant withdrew her application and on 13 February 1996, filed an appeal with the Joint Appeals Board (JAB) against the administrative decision to re-circulate the post.

On 3 May 1996, the Director, Division of Administration, UNOG, informed the Applicant that the Secretary-General had decided to terminate her employment under the 1996 Early Separation Programme and that he had agreed to the Applicant's request that she receive her termination indemnity in the form of special leave with full pay from 1 August 1996 until 13 March 1997, and on special leave without pay (for Pension Fund purposes) from 14 March 1997 until 22 May 1997. On 8 May 1996, the Applicant signed her acceptance of the terms and conditions of her separation. However, the following day she was advised that an additional condition had been placed on her early separation and that she would also be required to withdraw her JAB appeal. On 26 June 1996, she informed the Director, Division of Administration, that she would not comply with this additional condition. On 18 July 1996, the Chief, Strategic Planning for Human Resources Management, UNOG, advised her that her separation would proceed in accordance with the original agreement and that she was no longer required to withdraw her appeal.

On 13 February 1996, the Applicant lodged an appeal with the Geneva JAB. The JAB submitted its report on 16 October 1998. Its conclusions and recommendation read as follows:

"Conclusions

66. The Panel concluded that the Appellant's candidature for promotion to the post of Chief, ORES, had been denied full and fair consideration. On one hand, procedural errors, administrative confusion and delays doomed the Appellant's case to failure when it was submitted to [the] APB. On the other hand, the Appellant was deprived of her rights to bring additional information to the attention of [the] APB or to submit a recourse, thus violating the due process. It was undisputable thus that the Secretary-General's decision to recirculate the post of Chief, ORES, was based on flawed procedures. This should engage the responsibility of the Administration and entail compensation for the injury suffered by the Appellant.

67. In considering the Appellant's claim for retroactive promotion, the Panel recalled the Administrative Tribunal jurisprudence and agreed that it could not say with any certainty what [the] APB would have decided had the case been properly presented to it. Nor did the Panel wish to even substitute for [the] APB. Therefore, the Panel concluded that it was not in a position to recommend a retroactive promotion. Nor could it recommend that the Appellant's case be resubmitted to [the] APB.

68. However, here was a staff member who, over a period of 22 years, had consistently received the highest ratings, who had been recommended several times for the post at issue, who had carried out the functions of this post for more than two years. Her subsequent possible advancement was frustrated by the Administration through errors and delays in the handling of her case. Her case for promotion in 1994/1995 was not even considered on its merits by [the] APB, despite several recommendations, and she was deprived of her rights for recourse before [the] APB. No better candidate was even selected for the post, which remained vacant.

69. In view of the above consideration, the Panel interpreted the Appellant's decision to withdraw her candidature and to agree for early separation as a reaction or weariness of a staff member, faced with administrative mishandling of her case and who felt she was unfairly treated.

70. The members of the Panel also agreed to declare that, in their view and had the Appellant's case been properly presented to [the] APB in 1994, its was highly probable that she would have been promoted to the post of Chief, ORES.

71. In considering what remedial action to recommend, the Panel took note of the Appellant's concern for moral satisfaction. The Panel concluded that, not being able to recommend retroactive promotion, it had to establish some form of compensation which, in keeping with the gravity of the injury suffered by the Appellant, might provide her with a certain moral satisfaction.

72. The Panel thus decided to take as a parameter of reference what the Appellant's pension would have amounted to had she been promoted on 1 April 1994 – at which date she was granted a SPA [special post allowance].

73. The Panel also took into account a basic hypothesis followed by the United Nations Joint Staff Pension Fund, namely that life expectancy of women is 86 (eighty-six) years.

Recommendation

74. In view of the considerations and conclusions mentioned above, the Panel unanimously recommends the payment to the Appellant of the amount of $ 55,000 (fifty five thousands), for the damages suffered."

On 21 December 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General has ... taken note of the Board's finding that your candidature for promotion to the post of Chief/ORES had been denied full and fair consideration because of procedural errors, administrative confusion and delays, and because you had been deprived of your right to bring additional information to the attention of the APB or to submit a recourse. The Secretary-General has also taken note of the Board's conclusion that the decision to recirculate the post to which you had applied was based on flawed procedures. The Secretary-General is in agreement with those findings and further agrees with the Board that you should be compensated for those procedural errors and subsequent delays in connection with the consideration of your application for the post in question.

The Secretary-General has taken note that the Board has recommended that you be awarded compensation in the amount of US$ 55,000 and he understands that this amount represents the difference in pension between the P-4 and the P-5 levels payable over 31 years. He considers that, in recommending this amount, the Board relied on too many assumptions, to wit, that you would have been promoted to the P-5 level post of Chief/ORES; that you would have remained in service for at least three years following your promotion in order to receive pension at the P-5 level; and that you would be receiving such pension until the age of 86 years. The Secretary-General therefore cannot accept this

amount and he has decided that compensation be awarded in the amount of seven months net base salary at the rate in effect at the time of your separation from service.

..."

On 18 January 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The compensation awarded by the Respondent is totally arbitrary and bears no relationship to the injury suffered by the Applicant.

2. The calculation of the compensation due the Applicant by the JAB is based on actual financial loss and should be sustained.

3. The Respondent's rejection of the JAB's unanimous recommendation is arbitrary.

Whereas the Respondent's principal contention is:

The award to the Applicant of seven months net base salary at the rate in effect at the time of her separation from service constitutes adequate compensation for the harm the Applicant has suffered.

The Tribunal, having deliberated from 25 October to 17 November 2000, now pronounces the following judgement:

I. The Applicant claims payment of the full amount recommended by the JAB ($55,000.00), representing the difference in pension between P-4 and P-5 levels if paid over 31 years, i.e. until she reached the age of 86. She was awarded seven months net salary by the Respondent, which she claims is about $20,000.00 less than the amount recommended by the JAB, after the Respondent conceded that the promotion procedures applied in the Applicant's case were flawed and that she should be compensated for procedural errors and subsequent delays in connection with the consideration of her application for promotion.

II. The amount recommended was arrived at by the JAB on the assumption that the Applicant would have been promoted. The Tribunal is of the view that this was an erroneous assumption on which to base the calculation of compensation. The Tribunal has consistently held that a staff member has no right to promotion in the absence of a specific legal obligation creating such a corresponding right, but that is not the case here. On the other hand, the Tribunal has also held that the discretion to promote a staff member, which the Respondent enjoys, must not be abused. As the Tribunal stated in Judgement No. 905, *El-Far* (1998):

> "... The administrative authority has a discretion in regard to promotion (cf. Judgements No. 275, *Vassiliou*, No. 375, *Elle* (1986) and No. 390, *Walter* (1987). However, this discretion is not an absolute one and must be exercised without abuse so that the staff member is accorded fair treatment. ..."

Irregularities in procedure (see Judgement No. 293, *Nayyar* (1982)), including undue delay in taking a decision relating to a promotion (see Judgement No. 310, *Estabial* (1983)), may result in an abuse of discretion.

III. The Applicant had no right to promotion. Consequently, the issue here is not whether the Applicant should be compensated as if she had been promoted. Instead the issue is whether seven months salary is adequate compensation for the Respondent's unfair treatment of her - resulting from irregularities in procedure and undue delay in taking the promotion decision - which constituted an abuse of discretion.

IV. In this connection, the Tribunal notes the following statement of the Respondent on the record:

> "Regretfully again, a pronouncement was made by OHRM on 17 February 1994 to the effect that this case fell under the transitional measures outlined in ST/IC/1993/66 – pronouncement which is somewhat puzzling as in order to qualify, staff members had to have been placed against and fully assumed the higher level functions before 15 November 1993. In this case, the post was only vacated effective 1 January 1994 and the case thus already came under the provisions of ST/AI/390 which took effect on 15 November 1994.

> [...] When the case eventually was submitted to APB as a transitional case, the APB effectively disagreed with the pronouncement made by the then Director of Personnel and rejected the case on procedural grounds as it has done in other similar cases.
>
> To sum, delays caused by the initial difference of opinion between the substantive offices in UNOG, and at Headquarters on the candidature of [the Applicant] for the post of Chief, ORES, Geneva, compounded by procedural delays thereafter, have necessarily delayed preparation of this case for review by the APB in the proper context."

V. It also noted that in her memorandum dated 16 March 1994, the Director of Personnel, OHRM, had informed all Heads of Departments and Offices that "OHRM and the Appointment and Promotion bodies will not be able to consider any transitional cases received after 31 March 1994" and these "cases [should be presented to the APB] without delay". If the case was to be considered as a transitional case, as stressed by the Director of Personnel in her memorandum dated 17 February 1994, and as reiterated in a memorandum of 22 December 1994 by the Director of Conferences Services Division to the Chairperson of the APB, then clearly UNOG failed to meet the deadline for submission of the Applicant's case to the APB.

VI. Further, in her memorandum dated 8 August 1995, the Secretary of the APB informed the Applicant that, under ST/IC/1993/66, "the secretariat of the Appointment and Promotion bodies will inform the selected staff member and the applicants who have submitted additional 'pre-review' information of the outcome of the selection process. No guidelines, however, exist for informing candidates who were recommended by their departments but were not selected by the Secretary-General."

This explanation cannot be regarded as satisfactory. The lack of guidelines was a serious irregularity.

VII. The Respondent also offered the following explanation demonstrating that the Applicant's case should have been considered under the transitional measures:

> "It should be stressed that the transitional procedure was a *simplified* procedure and to be applied only in very exceptional circumstances.

> ST/IC/1993/66 (para.14) and other relevant issuances did not provide an avenue for recourse to the APB in the event that APB rejected a case. The recourse procedure as known prior to ST/AI/390 was last in force in connection with the 1992 placement and promotion exercise governed by ST/AI/373.
>
> A pre-review letter, as conceived under ST/AI/390 was not applicable to the transitional measures, mainly as such letters are addressed to the applicants *not* recommended for a given vacancy."

VIII. The Respondent states elsewhere that the Applicant's case had been wrongfully taken up under the transitional measures, and then refers to paragraph 14 of ST/IC/1993/66 to deny recourse to the Applicant, which would seem to imply rather that the Respondent continued handling the case as a transitional case. This kind of inconsistency and contradiction did not accord fair treatment to the Applicant.

IX. The Tribunal also notes that the promotion process was begun in early December 1993, when the Applicant submitted her application for the post and that the Applicant had still not been informed of an outcome when she withdrew her candidature on 3 January 1996. The lapse of over two years without a published result in the promotion process constitutes undue delay and unfair treatment.

X. The lack of transparency on the part of the Administration, the confusion caused by the absence of clear guidelines and the lack of clarity in the decisions by the Administration, the fact that for about two years a firm decision on promotion had not been taken and communicated to the Applicant before she accepted an agreed separation offer and the eventual failure to fill the post for which the Applicant had applied, all indicate clearly that she was treated in a very arbitrary and unfair manner.

XI. The seriousness of the wrong and moral injury done the Applicant warrants more than the compensation paid her by the Respondent. The Tribunal finds that compensation of ten months

salary in total would be appropriate in the circumstances. Hence, the Respondent must pay the Applicant an additional three months salary.

XII. For the foregoing reasons, the Tribunal:

(i) Orders the Respondent to pay the Applicant an additional three months net base salary at the rate in effect at the date of her separation from service in addition to what has been paid to her already;

(ii) Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Marsha A. ECHOLS
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary